IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARBARA M. CLINE, Plaintiff	:	CIVIL ACTION
v.	:	
BALA NURSING AND RETIREMENT CENTER, Defendants	:	NO. 97-5262

Newcomer, J. March , 199

M E M O R A N D U M

Presently before the Court are defendant Bala Nursing and Retirement Center's Motion for Summary Judgment and plaintiff's response thereto. For the reasons that follow, said Motion will be granted in part and denied in part.

A. Background[1]

Plaintiff in this case is Barbara Cline, a Licensed Practical Nurse who was employed with defendant Bala Nursing and Retirement Center as a Unit Manager of one of three units since January 3, 1995. As Unit Manager, plaintiff managed a sixty-bed nursing unit and supervised a total of six nurses. Apparently plaintiff ran her unit smoothly and competently, and until her termination received no negative reports, reprimands, or warnings.

During the summer of 1995 a nurse by the name of Tom Arnold began to work for Bala in Unit 2 West under the supervision of Unit Manager Richard Coyle. In October or November of the same year the former Director of Nursing resigned

[1] The factual background is taken from plaintiff's Complaint and her response to defendant's Motion.

and was replaced by the new Director of Nursing, Marge McHugh, who was promoted to that position from within Bala. According to plaintiff, Ms. McHugh verbalized on several occasions her sexual desires for Mr. Arnold and at one time even claimed that Mr. Arnold liked the tattoo on her left breast. Furthermore plaintiff witnessed Mr. Arnold enter Ms. McHugh's office on several occasions, and on those occasions Ms. McHugh refused to answer calls or pages and had her blinds closed.

On January 2, 1996, plaintiff was summoned to Ms. McHugh's office where Ms. McHugh and Bala Administrator Gordon Nedwed awaited her. There, during a five-to-ten minute meeting, Ms. McHugh terminated plaintiff for alleged incompetence. Plaintiff was given no warning and was not permitted the opportunity to correct any alleged infractions. The following day Ms. McHugh announced that Mr. Arnold would be replacing plaintiff as Unit Manager of 1 East. According to plaintiff, another nurse, Gwen Bing, thereafter informed plaintiff that Mr. Arnold had told her that he had received his promotion because he was "doing Marge."

Plaintiff's Complaint contains two counts. Count I asserts a claim for gender discrimination under Title VII. Plaintiff claims that defendant discriminated against her on the basis of her sex in that she was terminated without an opportunity to correct the alleged infraction although at least on one occasion a similarly situated male was given such an opportunity and was not terminated, in that her position was

filled by a less qualified male who had committed at least one infraction which warranted immediate termination, and in that this male was promoted because he was sexually involved with the supervisor who terminated plaintiff. Count II asserts a claim for negligent supervision. Plaintiff claims that Ms. McHugh evaluated plaintiff's performance in bad faith and with sexual motivations, that defendant Bala knew or should have known that Ms. McHugh's reason for firing plaintiff and promoting Mr. Arnold was to promote her paramour, and that defendant Bala failed in its duty to investigate and prevent Ms. McHugh's wrongful conduct.

Defendant now moves this Court for summary judgment as to both Counts of plaintiff's Complaint. As to Count I, defendant argues both that plaintiff's allegations have no support in the record, and that, even if plaintiff's allegations are taken as true, discrimination based on an employer's preference for the person with whom she is romantically and/or sexually involved does not make out a Title VII violation as a matter of law. As to Count II, defendant argues both that such a claim lacks factual basis, and that because the underlying alleged wrongful conduct fails to establish a Title VII violation, the negligent supervision tort must also be dismissed.

B. Summary Judgment Standard

A reviewing court may enter summary judgment where there are no genuine issues as to any material fact and one party is entitled to judgment as a matter of law. White v.

Westinghouse Elec. Co., 862 F.2d 56, 59 (3d Cir. 1988). The evidence presented must be viewed in the light most favorable to the non-moving party. Id. "The inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one sided that one party must, as a matter of law, prevail over the other." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). In deciding the motion for summary judgment, it is not the function of the Court to decide disputed questions of fact, but only to determine whether genuine issues of fact exist. Id. at 248-49.

The moving party has the initial burden of identifying evidence which it believes shows an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Childers v. Joseph, 842 F.2d 689, 694 (3d Cir. 1988). The moving party's burden may be discharged by demonstrating that there is an absence of evidence to support the nonmoving party's case. Celotex, 477 U.S. at 325. Once the moving party satisfies its burden, the burden shifts to the nonmoving party, who must go beyond its pleadings and designate specific facts, by use of affidavits, depositions, admissions, or answers to interrogatories, showing that there is a genuine issue for trial. Id. at 324. Moreover, when the nonmoving party bears the burden of proof, it must "make a showing sufficient to establish the existence of [every] element essential to that party's case." Equimark Commercial Fin. Co. v. C.I.T. Fin. Servs. Corp., 812 F.2d 141, 144 (3d Cir. 1987) (quoting Celotex, 477 U.S. at 322).

Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." White, 862 F.2d at 59 (quoting Celotex, 477 U.S. at 322).

C. Discussion

1. Count I: Title VII Gender Discrimination

Under Title VII of the Civil Rights Act of 1964, it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). In order to succeed on a claim brought under this statutory provision, a plaintiff must demonstrate, inter alia, that she suffered intentional discrimination because of her gender or sex. See Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990). In other words, plaintiff must show that she suffered adverse employment action, whether in the form of a termination or lack of promotion or otherwise, because she was a woman.

Defendant, in its instant Motion, points to the lack of admissible evidence to support plaintiff's case. In particular, defendant argues that plaintiff cannot support her case by unsubstantiated facts, opinions, and conclusions which are largely based on hearsay. Defendant also argues that, as a matter of law, preferential treatment given to a paramour fails

to make out a violation of Title VII because such preference is based on romantic motivations and not gender discrimination.

In her response, plaintiff does not refute defendant's argument that "discrimination" based solely on an employer's preference for his or her romantic partner fails to state a cause of action under Title VII. Instead plaintiff stresses that her claim is one of sex or gender discrimination, properly brought under Title VII, and not one of romantic discrimination. She claims that she was terminated because of her sex and not for defendant's pretextual reason of incompetence, and further that the evidence in the case demonstrates a pattern of differential treatment or sex discrimination in that Ms. McHugh disciplined female employees for violations for which she did not discipline male employees; in that Ms. McHugh terminated three female nurses for medication transcription errors for which Mr. Arnold was not terminated or even disciplined; and finally in that a male Unit Manager, Richard Coyle, was given a second and third chance when he exhibited trouble managing his unit while plaintiff, who had only received positive evaluations, was fired without so much as a chance to rectify any alleged wrongs. The Court examines the record before it to determine whether evidence exists to preclude summary judgment against plaintiff.

First, the Court considers plaintiff's claim that Ms. McHugh disciplined female employees for violations for which she did not discipline male employees. Plaintiff claims that male employees, such as Tom Arnold and Richard Coyle, were not

reprimanded for taking smoking breaks or for having open beverages on their assigned floors, but that female employees, such as Michelle McGrath, were frequently confronted by Ms. McHugh on these issues. In support thereof plaintiff offers the affidavit of Ms. McGrath who states that Ms. McHugh frequently reprimanded her for having water on her desk, while Tom and Richard, who always had coffee at their workstations--technically an infection control violation--were never reprimanded by Ms. McHugh to her knowledge. In addition Ms. McGrath states that both Tom and Richard smoked and took many breaks during their shifts, as well as a full lunch break, and to her knowledge neither were ever confronted or disciplined for taking too many breaks while Ms. McHugh complained through a third person that Ms. McGrath took too many breaks although she only took four small breaks and did not take a full lunch break.

Next, plaintiff contends that Ms. McHugh terminated three female nurses for the same type of medication transcription error for which Mr. Arnold was not terminated or even disciplined. Defendant asserts that this claim is not based upon personal knowledge but upon inadmissible hearsay statements from other nurses, as revealed through plaintiff's deposition testimony. The Court agrees with defendant that the double hearsay statements on which plaintiff relies are inadmissible and cannot be considered by this Court in determining the validity of this claim. Plaintiff states in her deposition that she heard from Ms. McGrath that three female nurses had been fired while

Mr. Arnold was still on the job. Plaintiff further states that the source of Ms. McGrath's knowledge was yet another nurse, Lori Clark. In her affidavit Ms. McGrath makes no mention of this alleged incident, thus confirming the Court's conclusion that she had no personal knowledge of the alleged incident. Plaintiff, in her response, purports to substantiate the assertion that Mr. Arnold made a transcription error by also pointing to her deposition. But the very portion of the deposition to which this Court's attention is directed contain's plaintiff's unequivocal statement that she had no personal knowledge of the incident. The Court thus finds that this assertion--that three female nurses were terminated for an error for which Mr. Arnold was not--is without support in the record presently before the Court.

Plaintiff also contends that a male Unit Manager, Richard Coyle, was given a second and third chance when he exhibited trouble managing his unit while plaintiff, who had only received positive evaluations, was fired without notice. For this assertion plaintiff again relies on the affidavit of Ms. McGrath who states that Mr. Coyle told her that he was experiencing difficulties managing 2 West.[2] According to Ms. McGrath, Mr. Coyle went to Ms. McHugh and was subsequently transferred to another unit and then to another position after that. Ms. McHugh hired a man to fill Mr. Coyle's position. It is uncontested that plaintiff was not given an opportunity to

[2] This statement is not hearsay as it is not offered nor taken for the truth of the matter asserted.

switch positions or transfer or even to correct her alleged infractions prior to being terminated.

Finally, plaintiff claims that although Mr. Arnold and Ms. McHugh were having an affair, the true import of her claim is that a more qualified female was replaced by a less qualified male. Defendant does not contest the qualifications of plaintiff nor attempt to shore up the qualifications of Mr. Arnold.

In viewing the bits and pieces of evidence of record before this Court as a whole, the Court, while noting that plaintiff's case as it currently stands is far from strong, cannot say that no triable issues of fact exist. Excluding the impermissible hearsay statements offered by plaintiff, the Court nevertheless finds that given the evidence, a jury could find an overall pattern of preferential treatment of men by Ms. McHugh and could find that plaintiff's discharge was not just to make room for Ms. McHugh's paramour but was also to make room for yet another male. The issue of which motivation was the determinative one is a quintessential issue of fact that the Court must reserve for the jury. Accordingly defendant's Motion is denied as to Count I of plaintiff's Complaint.[3]

2. Count II: Negligent Supervision

In Count II of her Complaint plaintiff asserts a state law claim of negligent supervision. This Court's review of the

[3] The Court cannot refrain from wondering why the summary judgment record presented by plaintiff was so sparse when the deposition testimony of even a few of the individuals named above could have established a stronger case.

case law, however, brings the Court to the unremarkable conclusion that this tort is not applicable to the present case. The tort of negligent supervision is usually asserted in cases where an employer is alleged to have proximately caused harm to an employee by negligently supervising a third-party employee whose direct acts injured the plaintiff employee. Many of the cases involving this tort arise in the context of worker's compensation actions where the court must determine whether the Worker's Compensation Act bars a common law action for negligent supervision. See, e.g., Mike v. Borough of Aliquippa, 421 A.2d 251 (Pa. Super. Ct. 1980); Gillespie v. Vecenie and Transport Motor Express, Inc., 436 A.2d 695 (Pa. Super. Ct. 1981). Bringing to bear the policy reasons behind the Worker's Compensation Act, the Pennsylvania court held that such a tort claim was not barred where the alleged harmful act by the third-party employee was found to be "personal." See Mike, 421 A.2d at 255. If so, and the employer was negligent in preventing the harm to the plaintiff or victim employee in that such harm was foreseeable, then liability can be established as to the employer. See id. at 257.

In the instant case, however, as is intuitively obvious in the opinion of the Court, the alleged third-party wrongdoer is the supervisor, an agent of the defendant company, who acted well within the scope of her agency in terminating plaintiff and promoting Mr. Arnold. The tort of negligent supervision assumes a distinction between the employer and the third-party employee

because the harmful conduct on the part of the employee was not within the scope of his or her employment. In this case, plaintiff must assert that under agency law the acts of Ms. McHugh were the acts of the defendant and that her acts were well within the scope of the agency relationship. Indeed, unless this agency relationship is assumed, plaintiff's Title VII claim against defendant must fail. Thus to attempt to bring a negligent supervision action against the same defendant for failing to supervise its agent who was supposedly acting within the scope of her authority is not only fundamentally inconsistent with the very premise of plaintiff's Title VII suit but simply illogical. As the Court is in agreement with defendant's reasoning, and as plaintiff has failed to direct the Court to any case law showing otherwise, defendant's Motion is granted as to Count II of plaintiff's Complaint.

D. Conclusion

In conclusion, Defendant's Motion for Summary Judgment will be granted in part and denied in part for the aforementioned reasons.

An appropriate Order follows.

Clarence C. Newcomer, J.

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O R D E R

AND NOW, this day of March, 1998, upon consideration of defendant's Motion for Summary Judgment, and plaintiff's response thereto, and consistent with the foregoing Memorandum, it is hereby ORDERED that said Motion is GRANTED in part and DENIED in part. It is further ORDERED that JUDGMENT is hereby ENTERED in favor of defendant and against plaintiff on Count II of plaintiff's Complaint.

AND IT IS SO ORDERED.

Clarence C. Newcomer, J.